COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Middelaer v. Delta (Corporation),*
2013 BCCA 189

Date: 20130418
Docket: CA040164

Between:

**Laurel Middelaer, Personal Representative of the Deceased,
Alexa Middelaer, Laurel Middelaer and Michael Middelaer**

Respondents
(Plaintiffs)

And

Carol Ann Berner and Daphne Middelaer

Respondents
(Defendants)

And

Insurance Corporation of British Columbia

Respondent
(Third Party)

And

The Corporation of Delta

Appellant
(Defendant)

Before: The Honourable Madam Justice Prowse
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Neilson

On appeal from: Supreme Court of British Columbia, July 16, 2012
(*Middelaer v. Berner et al*, Vancouver Registry S0103203; S103204; S0103257)

Oral Reasons for Judgment

Counsel for the Appellant:	E.E. Vanderburgh and K.A. McGoldrick
Counsel for the Respondents (Plaintiffs):	J.S. Stanley and T.M. Petrick
Counsel for the Respondent, ICBC	P.M. Mazzone
Place and Date of Hearing:	Vancouver, British Columbia April 17, 2013
Place and Date of Judgment:	Vancouver, British Columbia April 18, 2013

[1] **PROWSE J.A.**: The Corporation of Delta ("Delta") is appealing from the order of a chambers judge, made July 16, 2012, dismissing Delta's application pursuant to Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, to have the action commenced against it by the plaintiffs, Laurel Middelaer, personal representative of the deceased, Alexa Middelaer, Laurel Middelaer and Michael Middelaer, dismissed. The chambers judge found that the application was unsuitable for determination by way of summary judgment. In so doing, he did not find it necessary to call upon the plaintiffs. The chambers judge also stated that: "If the Corporation had satisfied me that this case was suitable for disposition by summary trial, and if I found that they had made out their case for dismissal, I would not have given judgment in Delta's favour because I think the only way this court could reach a just result in this case is by having a proper, full, *viva voce* trial, involving all the parties before the court."

[2] Leave to appeal was granted on October 1, 2012.

ISSUES ON APPEAL

[3] Delta submits that the chambers judge erred in finding that the action was unsuitable for summary disposition and in effectively finding that it would be unjust to grant judgment because he could not find the facts necessary to do so on the basis of the record then before him. In particular, Delta submits that the chambers judge erred in:

a) misapprehending the expert evidence and in finding a relevant conflict in that evidence;
b) failing to consider the other evidence available to enable him to find the facts necessary to render judgment;
c) failing to dismiss the action on the basis that there was no admissible evidence of causation against Delta.

[4] In short, Delta submits that it was entitled to judgment dismissing the action on the basis that the admissible evidence did not establish either that Delta had breached the requisite standard of care in the circumstances, or that there was a

causal connection between anything that Delta did, or failed to do, and the accident leading to the plaintiffs' alleged damages. Delta takes the position that a summary trial is a trial such that the plaintiffs were bound to come to the summary trial with all of the evidence necessary to prove their case. To the extent the plaintiffs' evidence was deficient in that regard, Delta was entitled to judgment. Delta submits that any other conclusion would reward parties who come to a summary trial unprepared.

BACKGROUND

[5] Delta is a defendant in a number of actions which arose from a motor vehicle accident in which a vehicle driven by the defendant, Carol Ann Berner, struck a vehicle parked on the shoulder of 64th Street in Delta, and then struck and killed Alexa Middelaer, and injured her aunt, Daphne Middelaer, who were standing on the shoulder of the road feeding horses. Ms. Berner was subsequently convicted of impaired driving and dangerous driving; her appeal to this Court was dismissed (2012 BCCA 466) as was her application for leave to appeal to the Supreme Court of Canada, [2013] S.C.C.A. No. 48. Ms. Berner has not filed a response to this proceeding, or to any of the related proceedings arising from the accident.

[6] The essence of the plaintiffs' claim against Delta is that Ms. Berner lost control of her vehicle after going over two speed humps which were located approximately 280 metres south of the scene of the accident. They allege that the speed humps were too close together and did not comply with Transportation Association of Canada guidelines for the spacing of speed humps in the circumstances. In the result, the plaintiffs submit that Delta was in breach of the standard of care with respect to the condition of the road. The plaintiffs further submit that Delta's breach of the standard of care was causally connected to the accident and the resulting damages suffered by them.

[7] Delta denies that the spacing of the speed humps breached the requisite standard of care and submits that the evidence does not support that conclusion. It also submits that the plaintiffs have failed to lead admissible evidence of any causal

connection between Ms. Berner driving over the speed humps and the ensuing accident.

DISCUSSION

Standard of Review

[8] Delta acknowledges that the decision of the chambers judge was a discretionary one attracting a deferential standard of review. In that regard, counsel for the parties refer to the decision of this Court in *Harrison v. British Columbia (Children and Family Development)*, 2010 BCCA 220 at para. 42, where Madam Justice Levine, speaking for the Court, stated:

> Appellate interference will be justified if the trial judge's determination that judgment should not be granted under Rule 18A [now Rule 9-7] is "clearly wrong". *McGregor v. Van Tilborg*, 2005 BCCA 216 at para. 21. If all of the facts necessary to support the defendant's application for dismissal could have been found in the evidentiary record, and it would not have been unjust for the trial judge to have done so, this Court will be entitled to substitute its opinion and dismiss the action: *Pearlman v. American Commerce Insurance Company,* 2009 BCCA 78 at para. 36.
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> (See, also, *Gichuru v. Pallai*, 2013 BCCA 60, at para. 34.)

[9] Having reviewed the materials before the Court, including a full transcript of the proceedings before the chambers judge, and the many authorities referred to by counsel, I am not persuaded that the chambers judge was clearly wrong in finding that the case was unsuitable for summary disposition. Nor am I persuaded that the chambers judge misinterpreted the effect of the expert reports in any significant way.

[10] It is apparent from reading both the reasons for judgment and the transcript of the proceedings that the chambers judge did not feel that he had sufficient evidence before him with respect to either the standard of care, or the issue of causation, which would permit him to reach a just result in the action. In his view, the expert evidence, which was directed primarily to the question of whether speed humps installed by Delta met the requisite guidelines, appeared to be inconsistent, or, in any event, inconclusive in terms of what the requisite standard of care was in the circumstances and whether Delta had breached it. He opined during the course of

the proceedings that the evidence could be read as giving rise to an inference that the spacing of the speed humps was not in accord with the industry standard; that the spacing may have been a factor in the Berner vehicle going out of control after crossing the speed humps, and that this may have been causally connected to the accident. He did not actually draw those inferences on the evidence, nor suggest that the evidence was sufficient to draw those inferences on a balance of probabilities. Rather, he concluded that he could not be satisfied on the record as it stood that it would be just to grant judgment.

[11] Delta forcefully submits that the onus was on the plaintiffs to prove their claim on the summary trial and that it simply failed to do so. Delta says that it would not have been open to the chambers judge to find in the plaintiffs' favour on the application based on the evidence before him.

[12] Delta relies on various authorities which emphasize that Rule 9-7 (formerly Rule 18A) is to be treated as a full trial on the merits and that parties who do not come prepared to argue the merits do so at their peril. This proposition is sound and was recently discussed by this Court in some detail in *Gichuru v. Pallai*, 2013 BCCA 60. There, Madam Justice Smith, speaking for the Court, and citing this Court's decision in *Brown v. Douglas*, 2011 BCCA 521 stated, at paras. 32-33:

> [32] All parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner. This requirement was underscored by Madam Justice Newbury in *Everest Canadian Properties Ltd. v. Mallmann,* 2008 BCCA 275:
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> > [34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988) 27 B.C.L.R. (2d) 378 (B.C.C.A.) at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of *viva voce* evidence, 'something might turn up': see *Hamilton v. Sutherland* (1992), 68

> B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The same is true of a plaintiff where the defence has brought the R. 18A motion. [Emphasis added.]

[33] Newbury J.A. discussed this issue in greater depth in *Brown v. Douglas,* 2011 BCCA 521 at paras. 29 and 30, which passages were relied upon by the trial judge (at para. 24):

> [29] I should also advert briefly to an argument made by the plaintiffs at the oral hearing of this appeal - that the summary trial judge should not have proceeded at all under Rule 18A in the face of their lack of evidence as to what counsel referred to as "proof of damages". ... It was said that in the circumstances, the summary trial judge should have dismissed the defendants' motion for judgment and permitted the plaintiffs to address this matter on a later occasion. In this regard, the plaintiffs cited the comments of this court in *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366, where Taggart J.A. described three options available to counsel faced with an application brought against his or her client under R. 18A. These options were:
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> > 1. He may agree that the case is an appropriate case for a summary trial and he may decide to seek judgment on the merits in favour of his client.
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> > 2. He may decide that it is a wholly inappropriate case for summary trial and he may decide to oppose the application for summary trial on the basis of material already filed and on the basis of additional material including affidavits that tend to show that the case is inappropriate for disposition under the rule.
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> > 3. He may decide that the case is an inappropriate case for summary trial but he may decide to file affidavits and other material tending to show that while it is not an appropriate case for summary trial, if there is to be a summary trial the judgment should be in favour of his client [At 384-5.]
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> The Court went on to observe that the language of what was then R. 18A(3) - more latterly, R. 18A(11) and now R. 9-7(11) - clothes the judge with a "broad discretion" to refuse to proceed where the judge is unable to find the facts necessary to decide the issues of fact or law or if it would be unjust to decide the issues.
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> [30] The authorities are clear, however, that (as counsel for the plaintiffs acknowledged at the hearing of this appeal) counsel acting on behalf of the respondent to an application for summary judgment who takes the second course described in *Placer* "runs a risk". This is the risk that the court will not agree that the case is not appropriate for summary trial and may give judgment against his or her client. This point was made in *Inspiration Management, supra,* where the Chief Justice observed at 214 that "There is no room in the proper construction of R. 18A for a respondent's veto." The point was also

> made at greater length in *Anglo Canadian Shipping Co. v. Pulp, Paper and Woodworkers of Canada, Local 8* (1988), 27 B.C.L.R. (2d) 378. There a plaintiff had sued for judgment under R. 18A, giving the defendant two months' notice of its application. The defendant did not examine the plaintiff for discovery within that period and on the day scheduled for trial, argued that it had been prevented from exploring arguments it might wish to make with respect to mitigation. The trial judge nevertheless granted judgment to the plaintiff under R. 18A and awarded damages of some $42,000. On appeal, this court rejected the defendant's argument that judgment should not have been granted. Lambert J.A. stated:
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> In my opinion, the summary trial procedure contemplated by R. 18A cannot be open to being frustrated by one of the parties delaying the pre-trial procedures until it is too late for the summary procedure to use them effectively.
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> I am not suggesting that there was any intentional delay in this case. But it must be the case that if adequate notice is given to an opposing party that a summary trial application is going to be brought on, there then falls on that party an obligation to take every reasonable step to complete as much of the pre-trial procedures as is necessary to put him in the best mastery of the facts that is reasonably possible before the summary trial proceedings are heard. He cannot, by failing to take those pre-trial procedures, frustrate the benefits of the summary trial rule.
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> ... In my opinion, it is not in this case appropriate that the judgment be set aside, on the ground that sufficient facts were not available to one of the parties to lay before the court on the summary trial application. [At 381-2.; emphasis added.]
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> *Anglo Canadian Shipping* has been cited and applied by this court on many occasions: see, e.g. *Everest Canadian Properties Ltd. v. Mallmann* 2008 BCCA 275 at paras. 34; *Gilmour Estate v. Parchomchuk,* 2011 BCCA 207 at paras. 19; *Dixon v. British Columbia Snowmobile Federation,* 2003 BCCA 174 at para. 5; *Strathloch Holdings Ltd. v. Christensen Bros. Foods Ltd.* (1997), 29 B.C.L.R. (3d) 341 (C.A.) at para. 12.

[13] I am sympathetic to Delta's argument that it was incumbent on the plaintiffs to call evidence sufficient to prove their case against Delta on the merits. I conclude, however, that its submission in this regard fails to acknowledge the broad discretion given to the court under Rule 9-7(15), which provides that, on the hearing of a summary trial application, the court may:

> (a) grant judgment in favour of any party, either on an issue or generally, unless

> i. the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
> ii. the court is of the opinion that it would be unjust to decide the issues on the application, ...

[14] In the *Gichuru* decision to which I have just referred, this Court went on (at para. 34) to refer to the discretionary nature of an order under Rule 9-7(15) and the deferential standard of review which must be applied by this Court to such decisions. There is no absolute rule that a plaintiff who has failed to lead sufficient evidence to prove its case, or a defendant who has failed to lead sufficient evidence to meet the case against it, will have judgment granted for or against them by virtue of that fact alone.

[15] In this case, as I said earlier, I am satisfied that it was open to the chambers judge to find that the expert evidence, as it stood, was an unsatisfactory foundation for coming to a reliable conclusion concerning the standard of care. Further, I am satisfied that it was open to the chambers judge to opine, by way of inference from the evidence, that there could be evidence called from which it may be possible to find a causal connection between the placement of the speed humps and the ensuing accident. He was not prepared to draw that inference on the basis of the evidence before him, but it is clear from the transcript of the proceedings that this was a question which was troubling him.

[16] In summary, I am not persuaded that the chambers judge was clearly wrong in concluding that it would be unjust to decide liability *vis-a-vis* Delta solely on the evidence before him. This was particularly so in that this action involved liability in relation to the death of a young child and there were other related actions in which the parties were seeking to add Delta as a party on the issue of liability, although those applications had not been resolved at the time of this hearing.

[17] Because I have come to the conclusion that this is a case in which, applying the requisite standard of review, it cannot be said that the chambers judge was clearly wrong, or otherwise erred in the result, I do not propose to say more about

the merits, or lack thereof, as the record presently stands. Suffice it to say that I agree with Delta that the plaintiffs took a significant risk in coming to the summary trial hearing with a focus on whether the case was suitable for summary disposition. As it happens, the chambers judge agreed with them.

[18] This case turned on its particular facts. It should not be regarded as an invitation to parties to treat summary trials as anything other than a full trial of the action. There will undoubtedly continue to be cases where, for a variety of reasons, the court may determine that the case is not suitable for summary judgment. However, counsel would be well advised to proceed with caution since there have been, and will be, instances where counsel have proceeded on the basis that a case was unsuitable for summary judgment only to have the court reject their arguments and grant judgment against their clients.

[19] I would dismiss this appeal.

[20] **D. SMITH J.A.**: I agree.

[21] **NEILSON J.A.**: I agree.

[22] **PROWSE J.A.**: The appeal is dismissed.

"The Honourable Madam Justice Prowse"